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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1126

VELMA S. PALMER,
PLAINTIFF, PETITIONER,

v.

ARTHUR E. NISSEN,
DEFENDANT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's Objections To Issuance of Writ

The Respondent, Arthur E. Nissen, appears in opposition to the petition of Velma S. Palmer, Petitioner, for a writ of certiorari filed in this Court on February 16, 1968,

seeking review of a judgment entered on September 25, 1967 in the Court of Appeals for the First Circuit.

The Respondent, Arthur E. Nissen, respectfully urges that this Court deny said petition because:

1. The judgment sought to be reviewed is a judgment affirming on appeal (per curiam) a judgment for costs only, entered in the United States District Court for the District of Maine (Southern Division) wherein the Court in the exercise of its conceded inherent equitable jurisdiction and power denied an award of additional costs prayed for by the Petitioner, (Plaintiff), where in the petition there is not set forth any sustainable claim of error in the Court of Appeals in the finding, i.e. that the Petitioner had not met the burden "to show that the Court was necessarily wrong and unjustified and that the evidence compelled a conclusion favorable to her."

2. The Supreme Court of the United States is without jurisdiction to issue the writ of certiorari to said Court of Appeals, prayed for in this petition, which was filed in this Court on February 16, 1968, seeking review of a judgment entered in said Court of Appeals on September 25, 1967 because said writ was not applied for within ninety (90) days after entry of such judgment, as is provided for in 28 USCA Sec. 2101(c) and because the time for applying for said writ had not been extended by a Justice of this Court as provided in said Sec. 2101(c).

3. This petition to the Supreme Court of the United States for a writ of certiorari to review a judgment in the Court of Appeals, affirming judgment for costs only entered in the District Court, which denied in the exercise of conceded inherent discretion and power, additional costs claimed by the Plaintiff is not allowable as a matter of law.

Statement of the Case

(In this brief, page references to Plaintiff's Record Appendix will be R. ., and the Defendant's Record Appendix will be D. R. .)

This was a diversity action originally brought by Stephen S. Palmer and Velma S. Palmer, as Plaintiffs, against Arthur E. Nissen, an attorney engaged in the practice of law in Maine, as Defendant, to recover money damages of an unspecified amount, interest and costs, (R. 8), claimed to have been sustained by the Plaintiffs by reason of services performed by the Defendant for the Plaintiffs "in a careless, negligent and unskillful manner and without that degree of , diligence and skill required of him as an attorney", (R. 6-7).

The issues as developed at initial pretrial conferences were whether (1) there were title defects in the property conveyed (2) the area conveyed by the deed was less than that provided in the purchase and sale agreement, R. 10 and 11.

Trial by the Court without a jury on the issues of liability (R. 29) resulted in a finding in favor of the Defendant on the issue of claimed title defects P. 55 and in the entry of a judgment by stipulation in favor of the Plaintiff upon a factual finding by the Court that the deed conveyed less land than that described in the sales agreement R. Page 64.

The Court found that the Plaintiffs "do not suggest that the Defendant acted fraudulently or in bad faith", (R. 54, Note 11).

Jury trial on the issue of damages resulted in a special verdict for the Plaintiff for $18,000.00 (R. 153) and an allowance by the Court of $600.00 as additional damages for legal, appraisal, survey and other expenses incurred by the Plaintiff.

Judgment entered in the amount of $18,600.00 with interest of $99.10 on December 30, 1966 was satisfied by the Defendant without prejudice to the right of the Plaintiff "to seek costs as provided by law." (D. R. 193).

The Plaintiff filed with the Clerk a bill of costs aggregating $13,565.22 (R. 156-157).

A taxation of costs by the Clerk allowed $460.13 (P. 166). On Plaintiff's Motion to Review of Clerks taxation of costs (R. 171-185), the Court entered an order on April 21, 1967 affirming the taxation of costs by the Clerk. The Court in the specific exercise of conceded inherent equitable discretion and power denied the Plaintiff's request for additional costs.

Appeal to the Court of Appeals was argued on September 11, 1967.

On September 25, 1967 the judgment sought to be reviewed was entered in that Court. Memorandum and order dated September 25, 1967 was filed in the District Court on October 11, 1967.

Argument

I. The Petition Should Be Denied

At outset we will, from the record, endeavor to place in their proper perspective, the claims of the Plaintiff that the defenses to the suit were unfounded, in bad faith, and were conducted in vexatious and wanton manner.

Such claims are the product of a very vivid imagination.

The material facts are:

1. After the Court had denied the Defendant's motion under Rule 12(e) FRCP for a more definite statement of the specific grounds upon which Plaintiff's action was predicated, the Defendant was informed at the initial pretrial conference (R. 13) of the specific grounds upon which the

alleged defects in the title were claimed to be defects. He thereupon furnished to the attorneys for the Plaintiff in recordable form, prior to the trial on the issues of liability, the documents listed in Note 12 (R. 55) which were, in fact, recorded by the local attorney for the Plaintiff in the Lincoln County Registry of Deeds. The Court ruled that said documents so furnished, corrected title defects, if any, in fact existed.

There certainly is nothing in that activity which possibly could be construed as wanton, vexatious or unfounded.

2. On the Plaintiff's claim that the deed, Plaintiff's Exhibit 2, (R. 36) conveyed less area than was described in the purchase and sale agreement, Plaintiff's Exhibit 2 (R. 33). The position taken in defense by the Defendant was that described property in the deed conveyed not only the entire area of the property described in the purchase and sale agreement but in addition thereto, conveyed riparian rights on adjoining property (R. 38) (line 2 starting with the word "Also" to the end of the paragraph). At the trial on the liability issue, the Defendant in open court stipulated that if the Court should find as a fact that less land was conveyed in the deed then without more, the Court was authorized to enter judgment for the Plaintiff and against the Defendant. See Note 4 (R. 49) which was the specific basis upon which the judgment was entered (R. 64) (second sentence in the first paragraph).

No reasonable claim could be advanced that the making of the aforesaid stipulation, was a wanton or vexatious activity, on the part of the Defendant.

The claim of the Plaintiff was that the discovery procedure was abused by the activity of the Defendant in taking four discovery depositions. The fact is, that each of the depositions following the first was taken under the specific direction of the Court and the necessity therefor, is

clearly shown by the statement of the Court at the top of the page (R. 176).

It is a significant fact that the Plaintiff was not called as a witness by her then counsel in either the hearing on liability or damages.

Her tirades against the Judge of the District Court, the Defendant and his counsel throughout the petition for certiorari should be treated as the obvious rantings of a belligerent litigant who did not see fit to offer herself as a witness in her own behalf, to testify under oath and subject herself to cross examination in the hearing before the Court on the liability issue or before the jury at the trial on the damage issue.

The pursuit of the claim for additional costs followed a similar pattern. The affidavit in the verified bill of cost was not made by the Plaintiff, who was present, but by her then attorney, who in his memorandum disclaimed personal knowledge as to the particular circumstances of the case, because they arose largely before he entered the case. (R. 154). The Plaintiff was not offered as a witness to support the ground upon which she based her claim for additional costs before the Clerk. Through her then counsel she simply filed a waiver of hearing before the Clerk and while she was present at the hearing before the Court on the Motion to Review the taxation of costs case, she did not testify (R. 171-188).

Incidentally, the Plaintiff precluded the writer of this brief, who handled the defense for the Defendant in the liability hearing, from participating before the jury in the damage hearing by naming him as a witness to be called by her (Pretrial Brief R. 152, eighth name listed) and then not calling him.

The bold broad statements of conclusions set forth in the second paragraph on Page 2 of the petition, or the final conclusion that the First Circuit Court of Appeals was

wrong and unjustified to affirm the decision of the Federal District, set forth in said second paragraph, cannot be held to control over the specific factual findings, hereinafter set forth, which demonstrate the meticulous care with which the Court considered the claims of the Plaintiff in support of her motion for an award of additional costs.

Digest of Factual Findings

1. That an examination of the depositions, will show that counsel, "just could not get answers to questions which were asked of the Plaintiff", (R. 176).
2. The Defendant was not responsible for the breach of relationship between the Palmers and their attorneys, (R. 176-177).
3. The expenses claimed by the Palmers were not in any way justified by the requirements of the litigation, (R. 177).
4. The finding of the court of breach of duty of due care was certainly not a finding of any intentional dereliction malfeasance, or wilful act on the part of the defendant, (R. 179).
5. The legal question involved and the interpretation of the sales agreement as against the deed was not an easy one and it certainly could be argued both ways, (R. 180).
6. There was both a substantial legal argument on liability, substantial factual argument on liability which the defendant was presenting throughout these proceedings, (R. 180).
7. The damage question was properly contested, (R. 181).
8. The Defendant cannot be charged with bad faith or dilatory tactics or vexatious litigation or breach of any conduct as an attorney by the act of defending this law suit in which liability was reasonably disputed (R. 181).

9. The Defendant prevailed on one of the liability issues and lost on the other liability issue and on the damages, the jury came in in between the positions of the two parties, (R. 181).

The factual finding on R. 186-188, inclusive, establishes a firm foundation for the exercise of the Courts conceded inherent equitable discretion and power in entering the order denying the Plaintiff's request for additional costs.

Law

Objections 1 & 3

(In the Interest of Brevity Objections 1 & 3 are to be argued together.)

It is plainly apparent that the sole question presented to this Court on this petition is whether the Plaintiff may be granted a review, by way of certiorari, of a judgment entered in the Court of Appeals, which affirmed a judgment for costs alone entered in the District Court in which the District Court denied in the exercise of its conceded inherent equitable discretion and power a request by the Plaintiff for an award of additional cost for counsel fees and other costs.

It is settled law that such a review is not allowable, either in this Court or in the Court of Appeals, whether the petition be construed as a petition for certiorari as indicated on Page 1, thereof, or as an appeal as indicated on Page 10.

Newton v. *Consolidated Gas Company of New York*, 265 U.S. 78 at 83, 44 S.Ct. Rep. 481 at 483—1924.

"The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in

the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the *power* of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute, and should not be enforced when the trial court *assumes the power to assess* as costs against a fund or a party, expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. (emphasis supplied)

Canter v. *American Insurance Company,* 1830 (NY) 3 Peters 307 — 28 L. ED. 688

No appeal lies from a mere decree respecting costs and expenses.

Glendale Elastic Fabrics Company v. *Smith,* (Mass.) 1879, 100 U.S. 110, 25 L. ED. 547

No appeal lies from a decree respecting costs and expenses.

Walker v. *Lee,* 71 Fed. 2 622 (CCA Cal.)

Order Taxing Costs is non-appealable if matter at issue is within judge's discretion.

West v. *East Coast Cedar Company,* (1902) 113 Fed. 742 — 101 Fed. 727

The awarding of costs in equity is discretionary with the court and no appeal lies from its action in the matter.

Lyons v. *Empire Fuel Company,* 1921, 257 Fed.2 890 (1939)

The only time that an order made after judgment denying Motion of the Plaintiff for allowance of costs or expenses is reviewable is when the order is based on want of power in the court to make the allowance.

See also:

U. S. v. *Knowles Est.* (1932), 58 Fed. 2 718
U. S. v. *Ward* (1923), 58 Fed. 2 1086

We have found no case where the Supreme Court or any Court of Appeals has ever granted an appellate review of such a judgment.

The Court of Appeals was right in ruling that under the "American Rule" each party concerned bears his own counsel fees.

Fleischman Distilling Co. v. *Maier Brewing Company,* Decided May 8, 1967. Reported in advance sheet No. 15, June 1, 1967 — 87 S.Ct. Reporter 1404.

Commencing at page 1406 (2), the court reviews and lists the pertinent Supreme Court cases developing and supporting the American Rule and the limited exceptions to that Rule.

On appeal the appellant has the burden of showing that the evidence before the court below, compelled a finding in his favor.

Barron & Holtzoff, Vol. 2B, Ch. 10, Sec. 1131, Page 514 and cases cited in Note 11.

The Court of Appeals was right in finding that this burden was not met. (Digest of factual findings, Page 7)

Allowance of counsel fees as additional costs may be made only in exceptional cases and for dominant reasons of justice and must be based on factual findings in the District Court of bad faith or fraud.

Niday v. *Graef* 279 Fed. 941
Gordon v. *Woods* 202 Fed. 2 476(1)
Bush v. *Remington Rand* 213 Fed. 2 456-466
Barron & Holtzoff (Wright Edition, Ch. 11 Par. 1197 Note 35, Pages 66 and 67)

Decision on this question is the duty and responsibility of the District Judge who entered the final judgment.

Farmer v. *Arabian American Oil Company,* 379 U.S. 227 at 233 85 S.Ct. Rep. 411 at 415

It is clear that the factual finding heretofore digested precluded any allowance of counsel fees. (Page 7 *supra*)

OBJECTION No. 2

Whether the judgment for costs entered on September 25, 1967 in the Court of Appeals be considered as a final judgment on that date or on the date of receipt of the Mandate to the District Court on October 11, 1967, this petition applying for the writ of certiorari entered in this Court on February 16, 1968 was not entered within ninety (90) days of the date of final judgment in the Court of Appeals and hence, this Court has not acquired jurisdiction to issue the writ of certiorari, so requested.

Toledo Scale Co. v. *Computing Scale Co.*, 1923 261 U.S. 399 43 S.Ct. 458
Bonin v. *Gulf Co.*, 1904 198 U.S. 115 25 S.Ct. 608
United States v. *Lippman, Spier & Holm*, 1922 260 U.S. 717 43 S.Ct. 95; 1922 260 U.S. 742 43 S.Ct. 163
Federal Trade Commission v. *Minneapolis, Honeywell Regulator Co.*, 1952 344 U.S. 206 73 S.Ct. 245
32 Am. Jur. 2nd Sec. 282 Page 747.

Conclusion

The Defendant, Respondent therefore urges that for the reasons herein set forth, the Plaintiff, Petitioner's request for issuance of a Writ of Certiorari to the Court of Appeals for the First Circuit be denied.

Respectfully submitted,

(s) WILLIAM B. MAHONEY
Attorney for Defendant, Respondent